STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	Docket No. 15-0273
	)	
Amendment of 83 Ill. Adm. Code 465	)	

REPLY BRIEF ON EXCEPTIONS OF THE ENVIRONMENTAL LAW & POLICY CENTER

The Environmental Law & Policy Center (ELPC) respectfully submits its replies to ComEd, Ameren, and the Illinois Competitive Energy Association's (ICEA) exceptions to the Administrative Law Judge's Proposed Second Notice Order in this docket, dated September 29, 2015 (Proposed Order). For the reasons discussed below, the Commission should reject ComEd and Ameren's objections to Proposed Section 465.90 regarding meter aggregation. The utilities' objections are based on a constrained and flawed interpretation of the Commission's authority to reasonably interpret and implement statutory commands consistent with the purposes of the General Assembly. The Commission should approve the Proposed Order and submit the proposed rulemaking amending 83 Ill. Adm. Code 465 to the Joint Committee on Administrative Rules pursuant to Section 5-40(c) of the Illinois Administrative Procedure Act to begin the second notice period.

I. Purpose and History of the Proposed Rule Amendments

In 2007, the Illinois General Assembly unanimously passed Public Act 95-420, which established new net metering requirements for electricity suppliers at Section 16-107.5 of the Public Utilities Act. The General Assembly found and declared that net metering serves several important state goals and "can encourage private investment in renewable energy resources, stimulate economic growth, enhance the continued diversification of Illinois' energy resource mix, and protect the Illinois environment." 220 ILCS 5/16-107.5(a). In 2011, the General

Assembly amended and expanded the Illinois net metering statute as part of SB 1652, the Energy Infrastructure Modernization Act ("EIMA"), Public Act 97-616. Among its many other provisions, the Act generally expanded the availability of net metering that would utilize the infrastructure improvements authorized by EIMA. Specifically, net metering was extended to customers operating eligible generating facilities with a nameplate rating of up to 2,000 kilowatts and also expanded the overall "program cap" from 1% of the utilities' total peak demand to 5% of total peak demand. The General Assembly further amended the net metering statute in 2012 to fix some technical issues related to the eligibility requirements for net metering customers. *See* Public Act 97-824.

By early 2013, the Commission Staff became aware of several problems related to the implementation of net metering in Illinois. Although the General Assembly required "all electricity providers" to "begin offering net metering no later than April 1, 2008," *see* 220 ILCS 5-16-107.5, many alternative suppliers were not (even in 2013) offering net metering programs to their customers or filing required annual net metering reports with the Commission.[1] Furthermore, several ComEd customers reported lengthy delays and the loss of net metering billing credits when switching (individually or through municipal aggregation) from utility service to a retail electric supplier.[2]

Finally, electricity providers including ComEd and Ameren had apparently never considered a single specific proposal to allow net metering on properties owned or leased by multiple customers or collectively served by a common renewable energy facility, despite the

[1] *See* Joint Comments of ELPC, CUB and Vote Solar on June 28, 2013 Draft Rule (July 23, 2013) (available at http://www.icc.illinois.gov/Electricity/workshops/NetMetering.aspx).

[2] *See* Joint Comments of ELPC, CUB, City of Chicago, ISEA, SEIA, and Vote Solar on May 13, 2014 Draft Rule (June 10, 2014) (available at http://www.icc.illinois.gov/Electricity/workshops/NetMetering.aspx). These Joint Comments included an attachment (Exhibit A) with several case studies illustrating the problems that Illinois net metering customers were experiencing when switching electricity providers.

General Assembly's explicit directive to consider "meter aggregation." 220 ILCS 5/16-107.5(l). These problems contributed to substantial confusion and frustration regarding net metering in ComEd and Ameren's service territory. In part due to these problems, net metering remains an extremely small program in Illinois. For example, ComEd's 2015 net metering report shows only 371 total net metering customers, representing less than one tenth of one percent (0.096%) of ComEd's peak demand supplied.

The Staff of the Illinois Commerce Commission initiated discussions with stakeholders in 2013 to address these problems and consider other necessary updates to the Commission's Part 465 regulations. Staff convened several stakeholder workshops, published informal draft rules, and accepted written stakeholder comments over a period of nearly two years between 2013 and early 2015.[3] Staff memorialized its findings and recommendations in the Policy Division's Staff Report in this docket, including a detailed rationale for the rule amendments proposed in this docket. The City of Chicago, the People of the State of Illinois, the Citizens Utility Board, Elevate Energy, and the Environmental Law & Policy Center have all intervened in this docket and have filed detailed comments and reply comments in support of the proposed rules.

II. The Commission Should Approve Proposed Section 465.90 – Meter Aggregation.

ComEd and Ameren both take issue with Proposed Section 465.90 regarding Meter Aggregation, which requires electricity suppliers to "separately consider" applications for meter aggregation and "provide an explanation" when they decide to reject a customer's application. (ComEd Exceptions 2, 3, 5, 6) (Ameren Exception I) The utilities argue that the proposed requirement to "separately consider" proposals for meter aggregation—as opposed to providing a

[3] These draft rules and stakeholder comments are available on the Commission's net metering website at http://www.icc.illinois.gov/Electricity/workshops/NetMetering.aspx.

one-time global "consideration" of the issue in general—conflicts with the statute and therefore exceeds the Commission's jurisdiction.

Meter Aggregation is intended to help promote equity and equal opportunity for customers to participate in net metering, in light of the fact that nearly 50% of residential and business utility customers are currently unable to host a solar PV system because they are renters, lack sufficient roof space, or live in multi-unit housing.[4] Small wind, biogas, and other forms of distributed generation are similarly unavailable for many customers. Shared renewable projects facilitated by meter aggregation can help promote fairness and equity, particularly in light of the fact that the customers lacking rooftop solar access often live in dense urban areas and are frequently lower income customers. (*See* Initial Comments of Elevate Energy at 2.) As the City points out, many Chicago residents live at or below the poverty line, and community shared solar facilitated by meter aggregation could help make utility service more affordable for these customers. (Initial Comments of the City of Chicago at 4.)

In order to expand access and promote equity, the Illinois General Assembly has required electricity providers to "consider" innovative meter aggregation projects that would enable apartment dwellers, multi-tenant buildings, and community-owned renewable projects to participate in the Illinois net metering program through a common, shared renewable energy facility. Section 16-107.5(l) of the Public Utilities Act states that "each electricity provider shall consider whether to allow meter aggregation for the purposes of net metering on:

> (1) properties owned or leased by multiple customers that contribute to the operation of an eligible renewable electrical generating facility, such as a community-owned wind project, a community-owned biomass project, a community-owned solar project, or a community methane digester processing livestock waste from multiple sources; and

[4] *See* National Renewable Energy Laboratory (NREL), *Shared Solar: Current Landscape, Market Potential, and the Impact of Federal Securities Regulation* at v (April 2015), *available at* www.nrel.gov/publications.

> (2) individual units, apartments, or properties owned or leased by multiple customers and collectively served by a common eligible renewable electrical generating facility, such as an apartment building served by photovoltaic panels on the roof.

220 ILCS 5/16-107.5(l).

Despite the statutory requirement to "consider" meter aggregation, ComEd and Ameren have failed to document consideration of even a single meter aggregation proposal in Illinois since the net metering statute was adopted in 2007. Instead, the utilities have argued that the "consideration" required by the subsection (l) of the Act effectively requires only a utility declaration that they have generally considered, as a matter of company policy and unconnected to any specific project proposals, whether to allow meter aggregation. Moreover, there is no documentation showing that the utilities have ever engaged in even this generalized "consideration" of meter aggregation, much less specific projects. As a result, the General Assembly's intent that meter aggregation receive fair consideration has been left unfulfilled.

The Commission's Proposed Section 465.90 strikes a reasonable balance that preserves the electricity provider's discretion to "consider" meter aggregation, but within a more structured, transparent, and fair process. The rule requires electricity providers to "separately consider" applications for meter aggregation and make a determination "based on the facts and circumstances presented in each application." (Proposed Section 465.90(a)) Whenever an electricity provider determines that it will not allow meter aggregation, it must provide an "explanation of its determination" in a written document provided to the Commission and the applicant. (Proposed Section 465.90(b).)

ComEd argues, incorrectly, that Proposed Section 465.90 "conflicts with the express provisions of [220 ILCS 5/16-107.5]." (ComEd BOE at 1). In reality, nothing in Proposed

Section 465.90 "conflicts" with anything in the Act. The Act requires electricity providers to "consider" meter aggregation. It does not require a "generalized" consideration nor does it explicitly require "individualized" consideration. The Commission must interpret the specific nature of the required "consideration" from the purpose and language of the provision. *See Krohe v. City of Bloomington*, 789 N.E. 2d 1211, 1213 (Ill. 2003) ("A statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more different ways.").

The Commission has reasonably interpreted the statute based on the Commission's best understanding of the General Assembly's legislative intent and the problems that have become evident over the past eight years. This is unquestionably within the Commission's authority and jurisdiction. In fact, the Commission's interpretation of ambiguous statutory provisions is entitled to "great deference," particularly where it is "informed by experience." *Business & Professional People for Public Interest v. Illinois Commerce Com.*, 171 Ill. App. 3d 948, 957 (Ill. App. Ct. 1st Dist. 1988), citing *Apple River v. Illinois Commerce Com.*, 18 Ill. 2d 518 (Ill. 1960).

It is a long-settled principle of administrative law that administrative agencies must have the authority and the flexibility to fill gaps and reasonably implement commands of the legislature through rules:

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.

Chevron U.S.A. v. NRDC, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); *see Business & Professional People for Public Interest v. Illinois Commerce Com.*, 146 Ill. 2d 175, 206 (Ill. 1991). ComEd's constrained interpretation of agency authority, if accepted by the Commission here, would hobble the Commission's ability to reasonably interpret and implement statutory commands and would undermine the purposes of the Act as

expressed by the General Assembly. ComEd's argument supporting its own favored interpretation of the Act also ignores the "deeply rooted" principle that statutes should be interpreted to avoid absurd results, *People v. Hanna*, 207 Ill. 2d 486, 498 (Ill. 2003), and the related "cardinal rule" against interpretations that render any part of a statute "inoperative, superfluous, or insignificant." *Estep v. Illinois Dep't of Public Aid*, 115 Ill. App. 3d 644 (Ill. App. Ct. 1st Dist. 1983) (quoting *People v. Lutz*, 73 Ill. 2d 204, 212 (Ill. 1978)). The General Assembly included a significant amount of detailed language regarding meter aggregation in subsection (l) of the Act, including several specific customer applications in which meter aggregation could be appropriate. It cannot have been the legislature's intent that no consideration of any of these scenarios has taken place over the past eight years, that no written record of any utilities' decisions not to offer meter aggregation exists, that no customer has any idea what they might do differently to develop a more acceptable meter aggregation proposal, and that the ICC lacks any ability to do anything about this. As the Proposed Order correctly observes:

> To allow ComEd, or any provider of electricity, to essentially ignore these applications based upon a blanket policy of disallowing meter aggregation, without explanation, distorts the purpose of Section 16-107.5(l) and is fundamentally unfair to customers.

(Proposed Order at 40.)

ComEd's related argument that the Commission has previously rejected an individualized review of meter aggregation also falls flat. Nearly eight years have passed since the Commission first addressed this issue in Docket 07-0483 and there is a much longer track record available to the Commission to assess the effectiveness of its rules. As the U.S. Supreme Court has explained in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*—arguably the most influential administrative law decision of the past 30 years—"[a]n initial agency interpretation is not

instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." 467 U.S. 837, 863-64 (1984). In this case, the comprehensive workshop and rulemaking process have identified good reasons why the Commission's proposed interpretation of subsection (l) of the Act is more consistent with the overall statutory framework than ComEd's competing interpretation. This reasonable interpretation of an ambiguous statutory provision is entitled to deference.

Similarly, ComEd's citation of the Commission's recent decision in Docket 15-0156 is a red herring. Docket 15-0156 was not a rulemaking docket. It involved a third party's request to initiate a tariff proceeding involving a proposed community solar program in ComEd's service territory. The scope of the "consideration" of meter aggregation required by Section 16-107.5(l) was not at issue in that docket nor did the Commission engage with the policy considerations discussed at length in the Staff Report and Proposed Order in this docket. The Commission's Order in Docket 15-0156 is simply not relevant to the issues presented here.

Finally, ComEd's attempt to attack the entire premise of net metering as leading to "subsidization" is entirely inappropriate and irrelevant in this rulemaking docket. The General Assembly has required electricity providers to offer net metering and to "consider" meter aggregation. It is not any party's role or the Commission's role to question the merits of net metering in this forum. Instead, it is the Commission's role to interpret and apply the General Assembly's intent to the best of its ability. Even if the merits of net metering were somehow relevant to this rulemaking proceeding, ComEd's concerns that net metering is "unfair" and would lead to "subsidization" is not supported by any actual data, ignores the many benefits of distributed generation, ignores the structural protection already provided by the Illinois net

metering statute, and ignores the extremely low penetration of net metering customers currently on ComEd's system.

ComEd's "subsidization" concerns have no merit in light of the fact that the Illinois net metering statute includes a 5% program cap to keep the overall program size reasonable. 220 ILCS 5/16-107.5(j). This program cap, which applies equally to traditional net metering and meter aggregation, was raised from 1% to 5% in 2011 as part of Public Act 097-0616, commonly known as the "Smart Grid" bill (SB 1652), in part because ComEd and other stakeholders claimed that investments in Advanced Metering Infrastructure (AMI) would help deliver customer benefits like distributed generation and energy efficiency. Over the past four years since SB1652 was adopted, ComEd has not even reached a 1% level of net metering penetration. In fact, as mentioned above, the company's net metering customers still represent less than one tenth of one percent (0.096%) of ComEd's peak demand. It is unreasonable for ComEd to claim that net metering is "unfair" when the legislature balanced a negotiated expansion in net metering to deliver customer benefits with the opportunity to earn a return on AMI investments under SB 1652. In any event, ComEd has made no attempt to quantify or explain the actual extent of "subsidization" that it is concerned about, despite more than two years of substantive workshops and regulatory proceedings in this docket. The record simply does not support ComEd's argument, particularly in light of the numerous independent studies concluding that the benefits of net metering frequently exceed the costs.[5]

ComEd also suggests that electric utilities should not be required to provide delivery credits to customers in cases where an ARES decides to offer meter aggregation to its customers. (ComEd Exception No. 3.) However, the Proposed Order correctly recognizes that ComEd's argument would essentially leave the utility with "veto power" over any meter aggregation

[5] *See* ELPC Ver. Resp. to Init. Com. at 5-6.

project contemplated by other electricity suppliers within ComEd's service territory. As recognized in the Proposed Order, this would "frustrate the purpose of the net metering program." (Proposed Order at 41.) It would also likely violate the law. Specifically, the Act requires electricity providers to provide electricity service to net metering customers at "non-discriminatory rates that are identical, with respect to rate structure, retail rate components, and any monthly charges, to the rates that the customer would be charged if not a net metering customer." 220 ILCS 5/16-107.5(e-5). In order to maintain an "identical" rate structure for net metering participants, both the electricity supplier and the deliverer of electricity must be aligned and included together in a meter aggregation program. The Proposed Order's requirement that utilities provide delivery service credits where an ARES has elected to offer net metering based on meter aggregation recognizes and protects this "non-discrimination" principle and ensures that participants in a meter aggregation program continue to receive net metering service based on rate structure that is "identical" to the rates that the customer would be charged if not a net metering customer, as required by law.

In sum, the Commission's determination that the legislature intended something more than a one-time "global" consideration of meter aggregation is supported by the purposes and language of the statute or, at the least, is a reasonable interpretation of an ambiguous statutory provision. In either case, the Commission's interpretation is entitled to deference, particularly in light of the net metering statute's overall goals to "encourage private investment in renewable energy resources, stimulate economic growth, enhance the continued diversification of Illinois' energy resource mix, and protect the Illinois environment." 220 ILCS 5/16-107.5(a).

III. The Commission Should Maintain Strong Public Reporting, While Protecting Information That is Truly Confidential.

ICEA objects to the reporting requirements in Proposed Section 465.40, claiming that they threaten highly confidential information. (ICEA Exception 3.) ELPC agrees that confidential information should be protected consistent with Illinois law, but disagrees with ICEA's suggested language that would eliminate any requirement for the Commission to maintain annual reports on its website except on an aggregated basis. The record in this case demonstrates that, until recently, many ARES have failed to comply with their obligations to offer net metering and file annual reports as required by the Act.[6] The failure of many electricity providers to offer net metering programs has created problems for members of the public that are taking service from an ARES and are interested in developing solar or other eligible renewable energy technologies. The Commission's requirement to post annual net metering reports on its website helps to promote transparency, accountability, and compliance with the law. If information in the reports is truly confidential, it can be redacted following existing Commission procedures. This could be supplemented, as ICEA suggests, by an aggregated summary of the reports on the Commission's website. However, there is great public value in maintaining access to public versions of the individual reports themselves in order to promote transparency, accountability, and informed customer choice. The Commission should reject ICEA's Exception 3.

IV. The Commission's Proposed Order Adequately Addresses ICEA's Concerns About Meter Aggregation.

Although ICEA is not opposed to meter aggregation, it is concerned that "utility acquiescence" is required in order to functionally allow a RES to offer a meter aggregation

[6] *See* Joint Comments of ELPC, CUB and Vote Solar on June 28, 2013 Draft Rule (July 23, 2013) (available at http://www.icc.illinois.gov/downloads/public/ELPC%20CUB%20and%20VS%20Comments%20.pdf).

program to its customers. (ICEA Exception 4) The Proposed Order addresses this concern by placing the decision to offer meter aggregation squarely in the hands of the electricity supplier:

> Moreover, the Commission, by rejecting the change from "electricity supplier" to "electricity provider," recognizes that the supplier is the party that negotiated the contract with the customer and is the source of the customer's power. It should not be within the purview of the entity not supplying the electricity to frustrate the purpose of the net metering program by disallowing meter aggregation. The Commission agrees with Staff's proposal that a determination whether to allow meter aggregation should be left exclusively to electricity suppliers.

(Proposed Order at 41.) Therefore, ICEA's concerns have been addressed and the Commission can disregard ICEA Exception 4.

V. Conclusion

For the reasons stated above, the Commission should approve the Proposed Order and submit the proposed rulemaking amending 83 Ill. Adm. Code 465 to the Joint Committee on Administrative Rules pursuant to Section 5-40(c) of the Illinois Administrative Procedure Act to begin the second notice period.

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Respectfully submitted,

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